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Office - Supreme Court, U. S.
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JUN 20 1952
CHARLES ELMORE CROPLEY

No. 143

IN THE

Supreme Court of the United States

October Term—1952

JOHN JAROSZEWSKI,

Petitioner,

vs.

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY WITH BRIEF IN SUPPORT THEREOF

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner John Jaroszewski respectfully prays for a writ of certiorari to the Supreme Court of New Jersey, to review a judgment of that Court entered on the 7th day of April, 1952, reversing a judgment of the Hudson County Court, Law Division, of the State of New Jersey, rendered on the verdict of the jury for plaintiff in an action under the Federal Employers Liability Act, 35 Stat. 65, c. 149 as amended, 45 U. S. C. A. Sections 51 *et seq.*

Summary and Short Statement of Matters Involved

Petitioner, an employee of the Central Railroad Company of New Jersey, respondent herein, was injured by the falling of a freight car door while he was performing his duties as such employee. He brought his action for damages under the Federal Employers Liability Act charging the respondent railroad with negligence. At the end of the trial, the case was submitted to the jury, which returned a verdict of $15,000 in favor of petitioner. On respondent's motion for a new trial, the Trial Court reduced the verdict to $7,000. On appeal by the respondent to the Appellate Division of the Superior Court of New Jersey, the case was certified by the Supreme Court of New Jersey on its own motion, and the judgment reversed by a majority of the Court, one Justice dissenting, which held that petitioner failed to prove negligence on the part of the respondent and that the motion to dismiss should have been granted. Thereupon it was ordered that judgment be entered for the respondent.

It is the petitioner's contention that by reversing the judgment rendered by the jury, the Supreme Court of New Jersey in effect denied petitioner his right to trial by jury guaranteed by the Constitution. The petitioner further contends that when the Supreme Court of New Jersey reversed the verdict of the jury, in effect it applied the defense of assumption of risk, which is specifically excluded as a defense under the Federal Employers Liability Act. The Court, in the guise of finding non-negligence on the part of the respondent, applied the qualified defense of contributory negligence to defeat petitioner's rights under the Federal Employers Liability Act notwithstanding the contrary provisions of that statute. In deciding as a matter of law that no inference of railroad negligence could be drawn from the facts adduced at the trial, the Court invaded the jury's historic function,

disregarded the nature and scope of the rights and obligations arising under the Federal Employers Liability Act and failed to recognize that assumption of risk must be vigorously excluded, and that contributory negligence does not defeat the action, but merely bears on damages. This holding contravenes the authorities cited herein.

It is the petitioner's contention that in reaching this result, the Supreme Court of New Jersey disregarded the principles of law laid down by this Court in *Myers* v. *Pittsburgh Coal Co.*, 233 U. S. 184; *Western & A. R. Co.* v. *Hughes*, 278 U. S. 496; *New York C. R. Co.* v. *Marcone*, 281 U. S. 345; *Lumbra* v. *United States*, 290 U. S. 551; *Jenkins* v. *Kurn*, 313 U. S. 256; *Seago* v. *N. Y. C. R. Co.*, 315 U. S. 781; *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U. S. 54; *Bailey* v. *Central Vermont R. Co.*, 319 U. S. 350; *Owens* v. *Union Pacific R. Co.*, 319 U. S. 715; *Tennant* v. *Peoria & P. U. R. Co.*, 321 U. S. 29; *Blair* v. *Baltimore & O. R. Co.*, 323 U. S. 600; *Lavender* v. *Kurn*, 327 U. S. 645; *Jesionowski* v. *Boston & Maine R. R.*, 329 U. S. 452; *Ellis v. Union Pacific R. Co.*, 329 U. S. 649; *Johnson* v. *United States*, 333 U. S. 46; *Wilkerson* v. *McCarthy*, 336 U. S. 53.

In the cases above cited this Court has held that questions such as here decided by the Supreme Court of New Jersey, as matters of law, are for the jury; that the evidence is to be viewed in the light most favorable to the plaintiff, giving the plaintiff the benefit of every inference favorable to him that may be fairly and reasonably drawn therefrom; that conflicts in the evidence, the credibility of witnesses and the weight to be given to their testimony are for the jury; that on the issue of liability, if reasonable and fairminded men may honestly draw different conclusions from the evidence, the question is one for the jury; that the refusal to submit such issues to the jury constitutes an abdication of any trial court's sworn duty to guard and protect the right of litigants suing under the

Federal Employers Liability Act to jury trial, and that to deprive railroad workers of the benefits of this right takes from them a goodly portion of the relief afforded by Congress.

This Court has also held in the cases above cited that courts are not free to set aside a jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable; that Congress by abolishing the defense of assumption of risk did not intend to leave open the identical defense by changing its name to non-negligence and that such a result will not be permitted.

Jurisdictional Statement

(a) Jurisdiction to grant this petition is invoked under Section 237 of the Judicial Code as amended, otherwise known as 28 U. S. C. A., Section 1257, subdivision (3).

(b) The Statutes of the United States applied by the Supreme Court of New Jersey are 45 U. S. C. A., Sections 51 *et seq.*; 35 Stat. 65, c. 149, as amended.

(c) The judgment of the Supreme Court of New Jersey was rendered on April 7, 1952. This petition for writ of certiorari was filed within the time provided for by the rules.

Question Presented

Is the application by the Supreme Court of New Jersey of the United States Statutes, commonly known as the Federal Employers Liability Act, inconsistent and in conflict with controlling decisions of the Supreme Court of

the United States where (a) its decision usurped the function of the jury; (b) it applied assumption of risk and contributory negligence in the guise of non-negligence to defeat a jury verdict and (c) it totally disregarded the controlling federal decisions?

Reasons for Granting the Writ

The Supreme Court of New Jersey has decided a Federal question of importance and substance in a manner not in accord with the decisions of this Court. It reversed a judgment of the trial court in an action brought under the Federal Employers Liability Act, where the jury had found the respondent guilty of negligence. By its decision the Supreme Court of New Jersey has failed to preserve for litigants in Federal Employers Liability cases their right to a trial by jury; it misinterpreted the scope and effect of the 1939 amendment to the Federal Employers Liability Act, doing away with the defense of assumption of risk; it has created a conflict between the application of the federal act in the state and federal courts.

It is essential that a writ be granted in order to preserve for litigants in Federal Employers Liability Act cases, their right to trial by jury, and in order to determine important questions relating to construction, interpretation and application of the Federal Statute in New Jersey, especially with respect to the interpretation by the New Jersey court of the scope and effect of the 1939 amendment doing away with the defense of assumption of risk, and in order to settle the conflict created by the decision of the Supreme Court of New Jersey.

Wherefore your petitioner prays that a writ of certiorari be issued out of, and under the seal of this Court directed to the Supreme Court of New Jersey, com-

manding said Court to certify and send to this Court a transcript of the record in the case entitled John Jaroszewski, Plaintiff-Respondent v. The Central Railroad Company of New Jersey, Defendant-Appellant, Docket No. A-92, September Term, 1951, including the proceedings in said Supreme Court, to the end that said cause may be reviewed by this Court and the judgment of the Supreme Court of New Jersey be reversed.

Dated: June 16, 1952.

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IN THE

Supreme Court of the United States

October Term—1951

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vs.

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY,

Respondent.

BRIEF IN SUPPORT OF PETITION

Opinion Below

The trial court submitted the case to the jury which returned a verdict for plaintiff (17).* The Supreme Court of New Jersey reversed the trial court. Its opinion, which is printed in the Appendix, is officially reported in 9 N. J. 231.

Jurisdiction

The judgment of the Supreme Court of New Jersey was rendered April 7, 1952.

The jurisdiction of the Supreme Court is invoked under Section 237 of the Judicial Code as amended, otherwise known as 28 U. S. C. A., Section 1257, subdivision (3).

* Numerical references relate to the pages of the record.

Statutes Involved

The Federal Employers Liability Act (Apr. 22, 1908) 35 Stat. 65, c. 149 as amended, 45 U. S. C. A., Sec. 51 *et seq.*

Sec. 51, Title 45 U. S. C. A. provides as follows:

> "Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.
>
> "Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter."

Sec. 53, Title 45 U. S. C. A. provides as follows:

> "In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided,* That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

Sec. 54, Title 45 U. S. C. A. provides as follows:

> "That in any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

Statement of the Case

Petitioner, a railroad car inspector about fifty-six years of age, was injured by the falling of a freight car door while he was performing his duties as an employee of de-

fendant The Central Railroad Company of New Jersey, hereinafter referred to as "Central," in its railroad yard "E" in Jersey City, New Jersey. He brought this action for damages, specifically invoking the Federal Employers Liability Act (16) in the Hudson County Court, Law Division, of the State of New Jersey. Defendant was charged with negligence in failing to make reasonable inspection, in failing to make repairs, in failing to remove the car from service and in failing to warn petitioner of the defective condition of the door as a result of which the freight car door fell upon him and caused the injuries (11).

The defenses were that petitioner was guilty of contributory negligence (3, 16); that the accident was caused by the sole negligence of petitioner, and that petitioner assumed the risk (16).

The car in question (159) although not owned by the defendant railroad, came under its control on July 23, 1948, at Taylor, Pennsylvania, where it was examined by one Regan, a car inspector for Central (133-134). The car at the time was loaded, and the door was closed. When Regan inspected the car, he found that it was in fair condition to move, and took no exception to the car (159). From Taylor, Pennsylvania the train moved to Elizabethport, New Jersey, arriving on July 24, 1948. Here it was inspected by Hurley and Ivanson, two other car inspectors for the Central. The car—one of 57 in the train—at this time was still loaded and the door closed and sealed (133-135, 160-161). No attempt was made to open the door. The inspectors found all items in good order and noted no exceptions (160-161). The following day the car was moved to Perth Amboy, New Jersey, and unloaded at that point by the consignee (133-135). The next movement of the cars was from Perth Amboy to the Jersey City yards of Central, at which place it arrived on July 27, 1948, empty and with its side door open (133-135).

Two days later the petitioner, who had worked as a car repair helper, car oiler and was at the time a car inspector (129), while examining a train of cars had occasion to inspect the freight car in question. He had examined about five or six cars when he noticed that the side door of this freight car was open (89). He had been instructed that in conjunction with his duties of inspecting the cars for defects, if he found a door open he was to close the door, and if the door would not close he was to determine what was wrong and shop it (90, 130, 152). It was the policy of the Central not to allow a car to ride in a high-speed train on a main line with the door open (152).

Petitioner first looked inside the car, which measured about forty feet long and which was over thirteen feet high, and noticed that the floor was in order and that the car was empty (90). He looked at the bottom rail, the door, door handle and door hasp (91). The car was brand new (91). He put his hands on the handle of the door which measured six feet high and seven feet wide, and attempted to close the door (91-92). The door moved to a point six or seven inches away from the door post and stopped (92). When it stopped, petitioner immediately looked at the bottom rail along which the door ran, to see what had caused the door to stop (93). The bottom rail was clear (93). He started to raise his head to look on top and before he could do so the door, weighing from two to three hundred pounds, fell on him (93).

It was shown that the car in question was on a track three feet away from an adjoining track, and that in order to protect himself petitioner would have to stand close to the car in examining the car, from which point the top rail was not in view (91).

After this occurrence and the removal of the door, an examination by Shippey, who was the foreman, and by

one Conway, the attention of both of whom was directed to the fact that there was some defect (144, 156) disclosed beyond question that a portion of the top rail over the doorway was defective (136, 156-158). It had been bent up so that while it would hold the door in its open position, it would not hold the door if it were moved to its closed position (156).

At the close of the entire case, defendant moved for a dismissal of the action on the ground that petitioner had failed to establish negligence on the part of defendant (163). The motion was denied, the trial judge holding that whether or not the defendant was guilty of negligence was a jury question (173). The case was then submitted to the jury which returned a verdict of $15,000 in favor of petitioner, and judgment was entered thereon on September 14, 1951. On defendant's motion for a new trial (22) the trial court reduced the verdict to $7,000.

The appeal by defendant to the Appellate Division of the Superior Court was certified on its own motion by the Supreme Court of New Jersey which reversed the judgment and directed final judgment in favor of the defendant.

Specification of Errors to be Urged

The Supreme Court of New Jersey committed prejudicial and reversible error:

1. In reversing the trial court and holding as a matter of law that there was no evidence of negligence to support the submission of the case to the jury, thereby usurping the function of the jury.

2. In holding under the guise of non-negligence on the part of respondent, that petitioner assumed the risk of his employment and was guilty of contributory negligence so as to defeat the jury verdict.

ARGUMENT

I.

The Supreme Court of New Jersey usurped the function of the jury and erred in determining as a matter of law that no inference of negligence on the part of the respondent could be drawn from the facts adduced at the trial.

The Supreme Court of New Jersey in reversing the verdict of the jury and directing that judgment be entered for the respondent, stated (p. 4a-appendix):

> "* * * There is nothing in the record to prove or from which legitimate inferences can be drawn that the defendant should have inspected the car at Perth Amboy, or that it was unreasonable for it to run the car from that point to its Jersey City yard before returning it to service."

It is submitted that this holding completely disregarded the conflicting evidence that was before the jury. The testimony clearly indicated that the respondent railroad inspected the car on July 23, 1948, at Taylor, Pennsylvania; that it inspected it on July 24, 1948, at Elizabethport, New Jersey, but that it made no inspection thereafter. The car arrived in Jersey City on the 27th of July. It was two days later—on July 29—that the petitioner while performing his duties for the respondent suffered the injury complained of when the door fell on him, which occasioned the suit (89, 133-135, 159-161).

One of the reasons advanced by the Supreme Court of New Jersey for its holding that the respondent was not negligent was that there was no proof that (p. 4a-appendix)—

> "* * * the siding of the consignee was a convenient or proper place to make an inspection, nor is there

proof of the necessity of or a practice, a custom, in railroading to make inspection of cars after their being unloaded by a consignee."

However, the fact of the falling of the door on the petitioner under the circumstances which in the ordinary course of human experience, would not have occurred but for the negligence of the respondent is an evidential inference for the jury to consider. The respondent was bound to show that it had exercised reasonable care to avoid the occurrence. It was under a duty to make reasonable inspection at convenient places of cars hauled over its road during the journey for the purpose of discovering defects likely to occur in the course of transportation. *Anderson* v. *Erie R. R, Co.*, 68 N. J. L. 647 (E. & A., 1903). There was proof that from July 24th until July 29th, when the accident occurred, no inspection had been made. Could not the jury have inferred from the facts that the failure to inspect for a period of five days was not the conduct of a reasonably prudent person under the circumstances? This question was one of fact for the jury. However, the Supreme Court of New Jersey by its decision took the issue of negligence away from the jury and decided as a matter of law that there was no negligence on the part of the respondent, basing its decision on failure of proof on the part of petitioner when in fact the failure of proof was on the part of the respondent, since there was a duty on it to make reasonable inspections.

The opinions of this Court, in construing the Federal Employers Liability Act, have repeatedly declared that it is "the clear Congressional intent that, to the maximum extent proper, questions in actions arising under the Act should be left to the jury," *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U. S. 54, 68; that such cases may not be taken from the jury merely because the question of liability is

"close or doubtful," *Bailey* v. *Central Vermont Ry.*, 319 U. S. 350, 354; that the jury has the right to make "all reasonably possible inferences" from such probative facts in the evidence as it chooses to accept, and "it is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences," *Tennant* v. *Peoria & P. U. Ry. Co.*, 321 U. S. 29; that in any choice between possible inference "a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference," but "only when there is a complete absence of probative facts to support the conclusion reached does reversible error appear," *Lavender* v. *Kurn*, 327 U. S. 645.

In *Tennant* v. *Peoria & P. U. Ry. Co.*, 321 U. S. 29, 35, this Court said:

> "Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable."

The falling of the door under the circumstances disclosed by the record gave rise to an inference of negligence on the part of the respondent under the doctrine of *res ipsa loquitur*.

In *Pitcairn* v. *Perry*, 122 F. 2d 881 (C. C. A. 8th, 1941); certiorari denied 314 U. S. 697, the facts were identical with those of the instant case. The court there held that the question of negligence was for the jury to determine. Also see:

Sweeney v. *Erving*, 228 U. S. 233;
Jesionowski v. *Boston & Maine R. R.*, 329 U. S. 452;

Johnson v. *United States*, 333 U. S. 46;
Long v. *Union Pac. Rd. Co.*, 192 F. 2d 788 (U. S. C. A. 10th, 1951).

The fact that the petitioner made specific allegations of negligence did not deprive him of the benefit of the doctrine of *res ipsa loquitur*. Indeed, the doctrine may be invoked to establish the particular acts causing the accident alleged just as any proof which petitioner might seek to introduce would be limited to the establishment of the negligence alleged.

Zumwalt v. *Gardner*, 160 F. 2d 298 (C. C. A. 8th, 1947).

II.

In holding under the guise of non-negligence on the part of respondent that petitioner assumed the risk of his employment and was guilty of contributory negligence so as to defeat the jury verdict, the Supreme Court of New Jersey committed reversible error.

The Supreme Court of New Jersey, in deciding as a matter of law that no inferences of railroad negligence could be drawn from the facts adduced at the trial, itself drew from the evidence a reverse inference that the sole proximate cause of the petitioner's injury was his own negligence in not observing the bent top rail, stating (p. 2a-appendix):

> "* * * A subsequent examination of the car disclosed a damaged top door rail which was obviously defective and which condition could have been discovered by the plaintiff had he looked at it prior to attempting to close the door."

This indicates and illustrates a determination on the part of the Court to draw from the evidence all inferences

necessary for the support of its opinion, including what it deemed to be petitioner's failure to take proper precautions. In other words, the Court was in effect denying a recovery by reason of supposed contributory negligence of petitioner. However, contributory negligence does not preclude recovery under the Federal Employers Liability Act. *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U. S. 54; *Owens* v. *Union Pacific R. Co.*, 319 U. S. 715; *Tennant* v. *Peoria & Pekin Union R. Co.*, 321 U. S. 29; *Wilkerson* v. *McCarthy*, 336 U. S. 53; *Carter* v. *Atlantic & St. A. B. R. Co.*, 338 U. S. 430.

If, therefore, under the Federal Employers Liability Act petitioner's negligence contributing with respondent's negligence to the production of the injury, does not defeat the cause of action, but only lessens the damages, the statute would be nullified by calling petitioner's act the proximate cause and then defeating him, when he could not be defeated by calling his act contributory negligence. His act was the same act by whatever name it is called. Furthermore, the Supreme Court of New Jersey failed to show an awareness of the nature and scope of the rights and obligations arising under the Federal Employers Liability Act as laid down by the Supreme Court of the United States decisions. It failed to recognize that assumption of risk must be rigorously excluded. The Supreme Court of New Jersey based its decision, among other reasons, on the following (pp. 4a-5a-appendix):

> "* * * It was his (referring to the petitioner) very duty to discover the defect which he asserts the defendant should have discovered by adequate previous inspection.* * *
>
> • • •
>
> "* * * It cannot be said that in such circumstances there was a violation of duty and disregard when it was the very performance of that duty which caused plaintiff's injuries."

The Supreme Court of New Jersey thereby completely disregarded the effect of the 1939 amendment, 53 Stat. 1404, 45 U. S. C. A. Sec. 54 to the Federal Employers Liability Act.

In *Pitcairn* v. *Perry*, 122 F. 2d 881 (C. C. A. 8th, 1941), certiorari denied 314 U. S. 697, plaintiff, a car inspector, sued the railroad under the Federal Employers Liability Act for injuries received from the falling of a freight car door while he was performing the duties of his employment. On appeal from a verdict of the jury in favor of the plaintiff, the Circuit Court of Appeals held that because of the fact that the door was under the employer's control and because of the employer's superior or exclusive knowledge thereof, there was a basis for the adoption of the "res ipsa loquitur" rule. It further held that the plaintiff as a railroad car inspector did not assume extraordinary risks arising from his employment.

It is submitted that the holding in that case is dispositive of the argument of the Court below that because of the fact that the petitioner was a car inspector and was injured during "the very performance of that duty" the respondent was not guilty of negligence.

In *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U. S. 54, 58, this Court in discussing the 1939 amendment said:

> "* * * We hold that every vestige of the doctrine of assumption of risk was obliterated from the law by the 1939 amendment, and that Congress, by abolishing the defense of assumption of risk in that statute, did not mean to leave open the identical defense for the master by changing its name to 'non-negligence.' As this Court said in facing the hazy margin between negligence and assumption of risk as involved in the Safety Appliance Act of (March 2) 1893, 45 U. S. C. A. Sec. 1, 'Unless great care be taken, the servant's rights will be sacrificed

> by simply charging him with assumption of the risk under another name;' and no such result can be permitted here."

Clearly the New Jersey holding is reversible error in view of the specific provisions of the Federal Employers Liability Act excluding the defense of assumption of risk and providing that contributory negligence does not bar recovery but merely bears on damages.

CONCLUSION

It is respectfully submitted that the opinion of the Supreme Court of New Jersey in this case is in conflict with the express provisions of the Federal Employers Liability Act and controlling decisions of this Court construing that Act; that a writ of certiorari should be granted in order that this Court review the record and opinion of the Supreme Court of New Jersey and finally reverse the same.

Respectfully submitted,

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[APPENDIX FOLLOWS]